STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH ERIC JOHNSON,

Defendant-Appellant.

UNPUBLISHED
June 13, 2006

No. 258492
Leelanau Circuit Court
LC No. 03-001367-FC

Before: Whitbeck C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction after a jury trial for first-degree home invasion, MCL 750.110a(2). Because the trial court did not abuse its discretion in allowing the expert testimony regarding the feather evidence, the trial court did not err when it declined to instruct the jury on attempted first-degree home invasion, and sufficient evidence existed to support defendant's conviction, we affirm.

This case arises out of a home invasion that occurred at a residence located in Leelanau, Michigan in December 2003. Michael Todd Sketch, a resident of the home, woke up to the sound of glass breaking, and upon investigation, saw a hand breaking through a kitchen window and a body starting to crawl through the window. When Sketch yelled, the person backed out and left through the same window. When the person backed out of the window, jagged glass still in the window tore the perpetrator's coat and feathers came out leaving some at the scene. A tip led the police to suspect defendant in this case. Police later found feathers matching those found at the scene of the crime in defendant's car and in defendant's trash. Evidence also showed that defendant had purchased a new black down coat on the same date he was arrested.

Defendant first argues that the trial court erred in allowing an expert to testify outside her area of expertise. Defendant objected to the challenged testimony at trial, but argued that it was hearsay. An objection on one ground does not preserve an appeal based on a different ground. *People v Bulmer*, 256 Mich App 33, 34-35, 662 NW2d 117 (2003). Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

Defendant agreed at trial that Cheryl Lozen of the Michigan State Police forensic lab was qualified as a trace evidence expert. However, defendant now argues on appeal that Lozen testified outside of her area of expertise when she testified about the source of feathers found at

the scene of the home invasion, in defendant's car, and in defendant's trash. Defendant also argues that this testimony was not helpful to the jury. MRE 702 governs the admission of expert testimony and provides as follows:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Expert testimony is necessary "to explain things not readily comprehensible to an average juror." *People v Christel*, 449 Mich 578, 597; 537 NW2d 194 (1995).

After reviewing the record, we conclude that Lozen was not testifying outside of her area of expertise when she testified that in her opinion all of the feathers could have come from the same source. Lozen testified that although she was never specifically trained in analyzing feathers, her basic training in trace evidence enabled her to take microscopic evidence of many different samples and analyze them. Lozen also testified that she heard presentations on analyzing feathers and read numerous papers and articles on feather analysis. Lozen also testified that before analyzing the feathers in this case, she consulted with other experts in the field, including an ornithologist. Under these facts, the trial court did not abuse its discretion in concluding that Lozen was qualified to give testimony about feather analysis.

Further, contrary to defendant's assertion, Lozen's testimony was helpful to the jury. The identity of the person who entered the victim's home was at issue. The feather testimony links defendant to the scene of the crime. Although it was not conclusive evidence, it was still one of the factors evidencing that defendant was the person who broke into the home. Again we conclude that the trial court did not abuse its discretion in allowing this testimony.

Defendant next argues that the trial court erred in refusing to instruct the jury on attempted first-degree home invasion. We review alleged errors in jury instructions de novo because they are questions of law. *People v Hubbard* (*After Remand*), 217 Mich App 459, 487; 552 NW2d 493 (1996). Reversal is only required when the jury instructions fail to protect a defendant's rights by unfairly presenting the issues to be tried. *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997).

Defendant argues that attempted first-degree home invasion is a necessarily included lesser offense of first-degree home invasion. However, in *People v Adams*, 416 Mich 53, 56-59; 330 NW2d 634 (1982),[1] our Supreme Court characterized an attempt to commit a crime as being a cognate offense of the substantive crime. And in *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002), our Supreme Court held that instruction on a cognate lesser offense is not

[1] Overruling *People v Lovett*, 396 Mich 101; 238 NW2d 44 (1976) (concluding that attempted armed robbery is a necessarily included offense of armed robbery).

permitted. Nonetheless, MCL 768.32(1) provides as follows:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, *or of an attempt to commit that offense*. [Emphasis added.]

Therefore, according to the statute, a trial court may instruct the jury on an attempt to commit the crime when the defendant requests the instruction.[2] However, an instruction on an attempt to commit an offense, like an instruction on a necessarily included lesser offense, is only required when a factual element found in the substantive crime, but not in the attempt, is disputed and a rational view of the evidence supports the instruction. See *Cornell*, *supra* at 357.

On appeal, defendant argues that the intent of the person entering the home was the disputed factual element. However, at trial defendant admitted that only the identity of the person who committed the home invasion was in dispute. Further, the intent of the person is an element of both first-degree home invasion and attempted first-degree home invasion. If the jury found that defendant lacked the intent to commit a larceny in the home, it would have had to acquit defendant of both charges, not find him guilty of attempted home invasion. Additionally, it was not disputed that the person who broke into the victim's home completed a home invasion. The evidence showed that the person broke a window and entered into the residence while the residence was occupied. Although the person did not completely enter the residence, an entry of some part of the person's body, however slight, is sufficient to show an entry for the purpose of a home invasion conviction. See *People v Gillman*, 66 Mich App 419, 429-430; 239 NW2d 396 (1976). There was no evidence to suggest that only an attempted home invasion occurred. Therefore, defendant's argument fails and the trial court correctly instructed the jury in this case.

Defendant finally argues that there was insufficient evidence for the jury to convict him of first-degree home invasion, specifically arguing that there was no evidence that the person who broke into the victim's home intended to commit a larceny or other felony therein. In reviewing a sufficiency of the evidence challenge, this Court determines "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

MCL 750.110a(2) defines first-degree home invasion as follows:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission

[2] We note that *Cornell* recognized "that MCL 768.32(1) . . . also permits instruction on an attempt to commit such [an] offense." *Cornell, supra* at 354 n 7.

> and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.

A defendant's intent can be proven by circumstantial evidence, including "the act, means, or the manner employed to commit the offense." *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). Further, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The act of breaking the window and attempting to enter the home itself is circumstantial evidence of defendant's intent to commit a larceny in the home. The jury could reasonably infer that defendant had the intent to commit a larceny in this case. Therefore, there was sufficient evidence for the jury to find defendant guilty of first-degree home invasion.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio